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8 **STATE OF WASHINGTON**
9 **THURSTON COUNTY SUPERIOR COURT**

10 STATE OF WASHINGTON,
11 DEPARTMENT OF ECOLOGY,

12 Petitioner,

13 v.

14 PUGET SOUNDKEEPER ALLIANCE;
15 WASTE ACTION PROJECT;
16 WASHINGTON PUBLIC EMPLOYEES
17 FOR ENVIRONMENTAL
18 RESPONSIBILITY; RESOURCES FOR
19 SUSTAINABLE COMMUNITIES;
20 CITIZENS FOR A HEALTHY BAY; and
21 WASHINGTON ENVIRONMENTAL
22 BALANCE, INC., Appellants below,

23 and,

24 THE BOEING COMPANY and
25 SNOHOMISH COUNTY, Appellants
26 below,

and,

THE ASSOCIATION OF WASHINGTON
BUSINESS, Intervenor below,

Respondents.

NO.

PETITION FOR JUDICIAL
REVIEW OF AGENCY ACTION

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I. PETITIONER

1.1 The petitioner in this action is the state of Washington, Department of Ecology ("Ecology"). Ecology's address is:

**Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600**

1.2 Ecology is the state agency authorized to issue National Pollutant Discharge Elimination System ("NPDES") permits.

II. PETITIONER'S ATTORNEY

2.1 Ecology is represented by:

**Ronald L. Lavigne
Assistant Attorney General
Ecology Division
2425 Bristol Court SW
P.O. Box 40117
Olympia, WA 98504-0117**

III. AGENCY ACTION

3.1 The Pollution Control Hearings Board ("PCHB") is a quasi-judicial administrative body established under Chapter 43.21B RCW. The PCHB is authorized to hear appeals involving NPDES Permits issued by Ecology. The PCHB's mailing address is:

**Pollution Control Hearings Board
P.O. Box 40903
Olympia, WA 98504-0903**

3.2 The agency actions at issue are the PCHB's Order Granting Partial Summary Judgment in PCHB Nos. 02-162, 02-163, and 02-164, dated June 6, 2003 ("SJ Order"); and the PCHB's Findings of Fact, Conclusions of Law and Order in PCHB Nos. 02-162, 02-163, and 02-164, dated August 4, 2003 ("Final Order"). A true and correct copy of the SJ Order is attached hereto as Exhibit A. A true and correct copy of the Final Order is attached hereto as Exhibit B.

1 3.3 The SJ Order and the Final Order both involve appeals of the General NPDES
2 Permit Ecology issued to regulate stormwater discharges from industrial facilities. This
3 permit is referred to as the Industrial Stormwater General Permit ("ISGP" or "Permit").

4 3.4 The SJ Order improperly invalidated the compliance schedule provided at
5 Condition S3.D.2 of the ISGP. The SJ Order also improperly invalidated the standard mixing
6 zone provisions provided for at Condition S3.E of the ISGP.

7 3.5 The Final Order improperly invalidated certain provisions of the monitoring
8 requirements specified at Condition S4 of the ISGP and improperly directed Ecology to
9 establish specific monitoring requirements regarding the first fall storm event, monitoring
10 requirements within mixing zones, and benchmark values for copper.

11 **IV. PARTIES IN AGENCY ADJUDICATIVE PROCEEDINGS**

12 4.1 The parties to the adjudicative hearing before the PCHB included:

13 A. Puget Soundkeeper Alliance, Waste Action Project, Washington Public
14 Employees for Environmental Responsibility, Resources for Sustainable Communities,
15 Citizens for a Healthy Bay, and Washington Environmental Balance, Inc., ("Environmental
16 Groups"), appellants below;

17 B. The Boeing Company and Snohomish County, appellants below;

18 C. The Association of Washington Business, intervenor below;

19 D. The State of Washington, Department of Ecology, respondent below.

20 **V. JURISDICTION**

21 5.1 This Petition is brought pursuant to the Administrative Procedure Act, Chapter
22 34.05 RCW. This petition is properly filed in Thurston County pursuant to RCW
23 34.05.514(1).

24 **VI. FACTS SHOWING PETITIONER ENTITLED TO JUDICIAL REVIEW**

25 6.1 The ISGP regulates stormwater discharges from approximately 1,300 industrial
26 facilities across Washington State. Ecology has the authority to require that a facility obtain

1 an individual NPDES Permit rather than being covered under the ISGP. The Environmental
2 Groups did not challenge the application of the ISGP to a particular permittee. Rather, the
3 Environmental Groups elected to bring a facial challenge to the ISGP. In bringing their facial
4 challenge, the Environmental Groups sought to prevent Ecology from using the ISGP to cover
5 any of the 1,300 facilities that may be eligible for coverage under the Permit. In its SJ Order,
6 the PCHB erroneously adopted a standard of review whereby the ISGP would be invalid with
7 respect to all potential permittees if the permit were "invalid in any respect." The use of this
8 erroneous standard of review allowed the PCHB to declare the ISGP invalid with respect to all
9 1,300 permittees without requiring the Environmental Groups to demonstrate that the Permit
10 was not capable of being lawfully applied to some of the permittees. The PCHB should have
11 applied a standard of review that is similar to the standard of review used in cases involving
12 facial challenges to statutes or regulations. Under this standard of review, the ISGP should be
13 valid if it is capable of being applied lawfully. This standard of review would allow Ecology
14 the flexibility to use the Permit where it is appropriate to do so, while preserving the right of
15 the Environmental Groups to appeal Ecology's decision to cover a particular facility under the
16 ISGP rather than require an individual NPDES Permit.

17 6.2 The ISGP authorizes a standard mixing zone if a permittee certifies that its
18 discharge meets the applicable requirements of state law for obtaining a mixing zone. In its
19 SJ Order, the PCHB erroneously concluded that the standard mixing zone provisions within
20 the Permit are invalid, despite the fact that a standard mixing zone is only authorized if a
21 permittee certifies that it meets all applicable requirements for a mixing zone.

22 6.3 The ISGP requires that permittees who discharge to water quality impaired
23 water bodies meet state water quality standards at the point of discharge. For existing
24 dischargers, the Permit provides a compliance schedule for permittees to come into
25 compliance with state water quality standards. In its SJ Order, the PCHB erroneously
26 concluded that the compliance schedule is inconsistent with state and federal law.

1 6.4 The ISGP requires that permittees monitor their stormwater discharges.
2 Monitoring results are then compared to benchmark values that allow the permittees and
3 Ecology to determine whether permittees are properly employing best management practices
4 to control stormwater discharges. In its Final Order, the PCHB erred in three regards with
5 respect to the monitoring requirements in the Permit. First, the PCHB erroneously directed
6 Ecology to require baseline sampling throughout the state at a designated major rainfall event.
7 Second, the PCHB erroneously directed Ecology to establish monitoring requirements in the
8 receiving waters for any permittee that had an authorized mixing zone if the stormwater could
9 potentially create a significant environmental risk and instream monitoring is feasible.
10 Finally, the PCHB erroneously directed Ecology to revise the benchmark value for copper to
11 be used in water where stormwater is identified as a limiting factor for salmon recovery and in
12 waters that are listed as impaired for copper under Section 303(d) of the Clean Water Act.

13 **VII. REASONS WHY RELIEF SHOULD BE GRANTED**

14 Petitioner, state of Washington, Department of Ecology, believes that relief should be
15 granted from the PCHB's SJ Order and Final Order for the following reasons:

16 7.1 The PCHB has erroneously interpreted and/or applied the law. The PCHB
17 employed an improper standard of review in considering a facial challenge to the ISGP.
18 Moreover, the PCHB erroneously interpreted and/or applied both state and federal law when it
19 invalidated monitoring requirements as well as the mixing zone and compliance schedule
20 provisions within the Permit.

21 7.2 The PCHB's SJ Order is not supported by substantial evidence. The evidence
22 before the PCHB demonstrated that Ecology properly provided for mixing zones and
23 compliance schedules within the Permit and that the Permit conditions related to mixing zones
24 and compliance schedules complied with applicable state and federal law. Consequently,
25 there is not substantial evidence in the record to support the PCHB's decision to vacate the
26 mixing zone and compliance schedule provisions within the Permit.

7.3 The PCHB's Final Order is not supported by substantial evidence because there is not substantial evidence in the record to support the PCHB's requirement that Ecology designate a major fall rainfall event as a baseline for all sampling throughout the state, that Ecology revise the Permit to include a lower benchmark value for copper in waters where stormwater is identified as a limiting factor for salmon recovery and in waters that are listed as impaired for copper by the state under Section 303(d) of the Clean Water Act. Finally, there is not substantial evidence to support the PCHB's requirement that Ecology establish monitoring requirements in the receiving water for mixing zones authorized under the Permit when stormwater could potentially create a significant environmental risk and such instream monitoring is feasible.

7.4 The PCHB erred in its Final Order by remanding the ISGP to Ecology with directions to include specific monitoring requirements in the Permit.

VIII. RELIFE REQUESTED

Petitioner, state of Washington, Department of Ecology, requests the following relief:

8.1 Reverse the standard of review employed by the PCHB which allows the PCHB to invalidate the ISGP if the PCHB finds the Permit is invalid in any respect with respect to any potential permittee;

8.2 Reverse the Summary Judgment Order to the extent it invalidates and remands the compliance schedule for existing facilities in Permit Condition S3.D.2;

8.3 Reverse the Summary Judgment Order to the extent it invalidates and remands the standard mixing zone application and approval procedures in Permit Condition S3.E;

8.4 Reverse the Final Order to the extent it remands the Permit to Ecology to require monitoring of a first fall storm event as a requirement of Condition S4;

8.5 Reverse the Final Order to the extent it invalidates and remands the benchmark for copper and requires development of a new copper benchmark;

1 8.6 Reverse the Final Order to the extent it directs Ecology to require monitoring at
2 the edge of a mixing zone; and

3 8.7 Such other and further relief as the Court deems just and equitable.

4 DATED this 3rd day of September, 2003.

5 CHRISTINE O. GREGOIRE
6 Attorney General

7 RONALD L. LAVIGNE, WSBA #18550
8 Assistant Attorney General

9 Attorneys for Petitioner
10 State of Washington
11 Department of Ecology
12 (360) 586-6751